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IN THE

Supreme Court of the United States

October Term, 1981

BOARD OF EDUCATION, ISLAND TREES UNION FREE SCHOOL DISTRICT NO. 26; RICHARD AHRENS, FRANK MARTIN, CHRISTINA FASULO, PATRICK HUGHES, RICHARD MELCHERS, RICHARD MICHAELS, AND LOUIS NESSIM,

Petitioners,

—against—

STEVEN A. PICO, by his next friend, FRANCES PICO; JACQUELINE GOLD, by her next friend, RONA GOLD; RUSSELL RIEGER, by his next friend, SAMUEL RIEGER; GLENN YARRIS, by his next friend, RICHARD YARRIS and PAUL SOCHINSKI, by his next friend, HENRY SOCHINSKI.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF
(In Support of Writ)

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INTRODUCTION

A review of Respondent's answering brief and those of the ten opposing *amici* compels a reply even at the risk of some repetition and of further burdening the Court. These answering briefs are so replete with incorrect inferences, misconceptions and falsely premised conclusions, none of which is borne out by the record, that close examination of the record becomes essential.

Almost without exception the answering briefs consistently and repetitiously make the assumption that Petitioners have without question acted to suppress ideas and points of view and attempted to impose orthodoxy. The source of the school board's initial information concerning the proscribed materials has been used to condemn the board's true motivation and it has been insinuated that the board members are "village tyrants" rather than "village Hampdens." (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943); brief of Association of American Publishers, Inc., et al., p. 15).

It is hoped that this reply will draw the Court's attention to the true nature of the actions complained of so that they may be placed in proper perspective in relation to the complex and momentous legal issues raised herein. Very appropriate to the matter at bar is Mr. Justice Frankfurter's statement in his dissent in *West Virginia State Board of Education v. Barnette, supra*, that

> To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issues and the reach of the consequences of our decision. 319 U.S. at 650, 651.

POINT I

PETITIONERS' ACTIONS WERE NOT INTENDED TO NOR DID THEY SUPPRESS IDEAS OR POINTS OF VIEW.

A blatantly incorrect allegation demanding immediate reply is that introducing Point II of Respondents' brief (p. 23) that "Defendants do not deny that their actions were in large measure prompted by their disagreement with the ideas expressed in the books." Defendants most assuredly, forcefully and unequivocally deny that very thing. Such allegation typifies the recurrent theme of the briefs of opposing *amici* that the Island Trees Board of Education in fact suppressed ideas and points of view and intended to do so by its actions. Petitioners are forced to again (See Petitioners' brief in chief at pp. 4, 10, 39, 40) and more explicitly deny such allegations.

There is not one allegation either in the complaint herein (J.A. pp. 1-7) or in Respondents' own statements pursuant to Local Rule 9-g implying in any way or manner that the school board either intended to or did in fact suppress or disagree with the ideas expressed in the banned books. Opposing counsel agreed in fact that there was no preclusion among the student body of discussion of the books themselves or their themes [ideas] nor was the staff instructed not to discuss them or not to comment upon their ideas or the position [points of view] that they represented. The intent of a 9-g statement is to limit the issues before the trial court and one issue eliminated was whether the board suppressed ideas or points of view. Equally important is the absolute failure of any of the answering briefs to indicate, identify or describe in any way those ideas or those points of view which were suppressed. Nowhere in the hundreds of pages of opposing briefs has there been any indication of the nature of the idea, ideology, concept, doctrine or theme of thought it is charged has been suppressed nor has there been even such an indication in the complaint or

Respondents' 9-g statement.

A *prima facie* case of the nature complained of requires much more than the language borrowed by Respondents from the case of *Minarcini v. Strongsville City School Dist.*, 541 F. 2d 577 (CA 6, 1976) alleging merely that the board members proscribed the books because they offended "their social, political and moral tastes". (J.A. p. 4) Nowhere has the charge been made of the banning of all material reflecting a particular ideological viewpoint or that the board's action was part of a consistent program to exclude particular ideological materials. (See *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents* - Harv. CR-CLLR, Vol. 14, pp. 518-22 (1979)). There has been no charge of a comprehensive censorship (or sanitization) of all material inconsistent with allegedly "orthodox" tenets. All that has been charged as a matter of record is that complained of in the complaint and in the 9-g statements. The cries of suppression of "ideas" and "viewpoints" contained in opposing briefs can have no probative value nor should they provide the stimulus for a lengthy circus-like trial during which Respondents can fish for patterns of exclusion. There are none.

If the board had determined to exclude a particular ideology, doctrine or body of thought it would certainly have proceeded in different fashion. Had more than vulgarity, indecency and bad taste motivated it, it would have approached matters in a more thorough and well-defined manner including, most probably, a review of all materials so as to effectively exclude concepts or ideologies. There were thousands upon thousands of books remaining in the school libraries after these were removed. The removal of such a random group of volumes as these cannot have possibly affected the presentation of those concepts or ideologies necessary to a balanced curriculum. The only common strain running through the proscribed materials is the vulgarity, indecency, bad taste and sexual allusions contained therein.

Proof of this common strain is easily seen. It is hoped that no more federal jurists will be compelled to read the volumes in question as Judge Mansfield (dissenting in the Court below) felt was necessary. However his conclusion must carry great weight when dicussing an allegation of suppression of ideas. Judge Mansfield stated that all but one of the books contained "indecent matter, vulgarities, profanities, explicit descriptions of sexual relations, some perverted, or disparaging remarks about Blacks, Jews or Christ." (638 F. 2d 404, 419). (In addition he found "freedom of the school's faculty and students to discuss in or out of school the ideas contained in the discontinued books..." (at p. 419)). Other jurists have described at least two of the discontinued books in the following manner:

> "How any educator entrusted during school hours with the educational, emotional and moral welfare and healthy growth of children could do other than reject such cheap, valueless reading material, is incomprehensible. Its repetitious obscenity and immorality, merely degrade and defile, teaching nothing" *Todd v. Rochester Community Schools*, 200 N.W. 2d 90 (1972) referring to *Slaughterhouse Five.*

> "Acts of criminal violence, sex, normal and perverse, as well as drug shooting are graphically described." *Presidents Council District 25 v. Community School Board No. 25*, 457 F. 2d 289, *cert. den.* 409 U.S. 998 (1972) at p. 291 referring to *Down These Mean Streets.*

Additional evidence of the board's intent and motivation can be adduced by examining the depositions of the only two of the board's seven members whom Respondents chose to examine and by examining the exhibits annexed to Petitioners' motion for summary judgment, many of which contain comments by the board made as part of the *res gestae.* Mr. Ahrens not only answered Respondents' counsel's questions at length under oath regarding his reasons, indicating no intent to suppress ideas or

points of view, but also countered readily and logically two of the arguments raised on numerous occasions by *amici*. *Amici* have made much of the critical acclaim of some of the banned books. Mr. Ahrens responded to a similar insinuation stating "I would imagine on most every book that is written there is going to be good and bad things said about it, but my concern was what I felt regarding my decisions, not [what] some critics [felt]."(dep. at pp. 72, 73). In responding to the oft repeated reminder that the streets were full of language of the type objected to Mr. Ahrens stated (p. 77) that the issue was not whether such language should be used on the streets of the South Bronx, but whether it should be used in schools.

It should be apparent therefore upon review of the record herein that an impermissible ideological sanitization of the school's libraries as a result of a desire to follow the political ideology of a particular organization just did not occur. What did happen is that well intentioned board members in furtherance of their duty to select and review curricular materials became aware of purportedly objectionable materials, examined same, found some, but not all, to be objectionable and by varying votes at a public meeting proscribed the volumes in question.

POINT II

PETITIONERS HAVE NOT CREATED AN IMPERMISSIBLE "PALL OF ORTHODOXY" OR DENIED THE PROPER PLACE OF HETEROGENEITY NOR SHOULD THEY BE COMPELLED TO KEEP THE DISTRICT'S LIBRARIES AND CURRICULUM COMPLETELY NEUTRAL IN CONTENT.

Respondents and *amici* have made much in their briefs of an alleged First Amendment compulsion of heterogeneity in the nation's secondary schools citing as support the "marketplace of ideas" concept referred to in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) at 603 and cited with approval in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) at p. 512. (Respondents' brief at 8, 11, 12). It is submitted that such a model is inapposite. *Keyishian* related to a university environment. *Tinker* was in error (albeit not crucial to the *Tinker* holding) in positing a "marketplace of ideas" model for elementary and secondary schools.[1]

To keep curriculum neutral in content and end all exclusionary practices in the nation's public schools is to abandon a key role basic to their operation—that of the responsibility of local boards of education to attempt to transmit a community's particular moral, social and political values to its students. Flowing from this are the equally important (and essential in the case at bar) concepts of local control of public education and the importance of judicial restraint. As stated in a recent government commission report:

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[1]For an excellent critique of *Tinker* as it relates to the issues at hand see *The First Amendment and Public Schools: The Case Against Judicial Intervention*, D. Diamond, Tex. L.R. Vol. 59: 477 (1981).

> Curriculum is neither neutral nor impartial. It necessarily reflects value judgments that significantly affect a child's perception of himself and society in general. The school shapes the culture and values of its students by presenting favorably certain styles and customs. U.S. Commission on Civil Rights, *Toward Quality Education for Mexican-Americans*, U.S. Gov't. Printing Office (1974).

Heterogeneity is necessary and important, but not to the extent that it requires each local school district to be a "marketplace of ideas" to the exclusion of efforts by elected school officials to inculcate those moral and social values deemed essential by that community. The values of our nation with its vast and desired hetereogeneity are a reflection of the varied yet distinct (in emphasis) values of the thousands of communities of which it is comprised. "Value inculcation, rather than value neutrality, has been the tradition of public education since the beginning of the American republic." Tex. L.R., supra, 59:477 at 499. This has been aptly put by Mr. Justice Powell in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1972) when he stated:

> Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate...No area of social concern stands to profit more from a municipality of viewpoints and from a diversity of approaches than does public education, 411 U.S. at 50.[2]

Practical exigencies, in addition to the pall placed on experimentation and innovation, would exist were school districts re-

[2]For an interesting development of the position that experimentation and innovation will be suppressed if opposing *amicis'* theory of different constitutional restrictions for shelving than for removing library books is upheld, see brief of supporting *amicus*, The Legal Foundation of America, pp. 7, 19-21. See also E. Durkheim, *Education and Sociology*, The Free Press (1956) (at pp. 70, 71) for support of the theory that the values of a society reflect the sum of the myriad homogeneous milieu (school districts) of which it is comprised.

quired to limit criteria for library book removal to availability of shelf space, obsolescence and architectural and fiscal necessity as many opposing *amici* have insisted. Not only are books commonly selected with the aid of librarians from available lists, subject to budget limitations. On occasion they are given to a school district as a donation or bequest. One book about which there has been substantial furor recently, *Our Bodies, Ourselves: A Book By and For Women*, "...is being distributed to schools nationally by abortion and sex-information clinics, according to Moral Majority and various parent organizations." (*Liberty*, Vol. 77, No. 1, January-February, 1982). If such is the case it is doubted a recipient district's board is even aware of its receipt and shelving since no fiscal records would exist.

Most librarians should exhibit a sensitivity toward acquisition of a volume concerning which there may be claims of indecency or vulgarity, but ours is not a perfect world. The librarian of the Chelsea School Committee (which was sued and compelled to restore an extremely vulgar poem to the school shelves) selected the anthology which contained the objectionable poem without having read the poem. That book was one of *one thousand* paperback books acquired at one time from one publisher. (*Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea*, et al., 454 F. Supp. 703 (D. Mass. 1978) at p. 706). By this or similar means many objectionable materials can be initially acquired unintentionally. Another scenario could be that of a bigoted librarian or staff member across whose desk passed a review of a volume noted solely for its bias and prejudice against a given minority. Although objectionable it could be intentionally acquired but under the legal principles proposed by Respondents and *amici* it could not be removed because of its content. Such an effect is undesirable and unsupported in law.

Content based decisions are commonly and properly made in the selection of curricular materials for public schools. A district

whose student body boasts a 95% college entrance rate will select quite different library materials than one in a mine or mill town with a 15% college entrance rate. One in a ghetto area of a major city may well select a heavier ratio of certain types of materials while a small farm community in the mid-West will select a vastly different mix depending upon the values its community (expressed through its governing board's decisions) desires to be reinforced and transmitted.

If a content based decision predicated upon the obscene language of a given curricular material is impermissible then the corollary must hold true. That is that anything goes, i.e. there will be no circumstances under which the presence of language which is not legally obscene can be used as a reason for prohibition. This is senseless in the context of public schools. To require value neutrality or to prohibit some degree of homogeneity in the public schools will violate the very principles necessary to the continued viability of our public schools and the concept of local control of public education.

The brief opposing *amicus*, American Library Association, et al, reminds the Court that "the case is about a *library*, not a school's curriculum" (at p. 3). This statement indicates a vital misconception of the degree to which a public school's library book collection (and many other forms of media materials these days since school libraries have become "media centers") are part and parcel of the district's curriculum. This is supported by the recent holding of the Third Circuit in *Seyfried v. Walton*, 50 U.S.L.W. 2430 (12/29/81), that a school district could bar performance of a musical with sexual content basically because the performance was an integral part of the school's educational program, i.e. part of the curriculum as contrasted with student newspapers and other "non-program related expressions of student opinion". School library collections have traditionally been and continue to be integral parts of the school's educational program and cur-

riculum, statements by *amici* to the contrary notwithstanding.

Respondents and opposing *amici* have also drawn incorrect analogies or have mistakenly applied principles which are not pertinent to the issues herein. We are not here concerned with a general public library as distinguished from a public school library nor are we dealing with a general public forum from the nature of which springs much of the neutral content rights asserted. It should also be remembered that although a school auditorium is much more of a public forum than a school library, a speaker no matter what his persuasion or topic, could be banned if his presentation were laced (or even lightly infused) with obscenities. The public schools, although still governed by the precepts of the Constitution, constitute a highly unique constitutional environment.

POINT III

RESPONDENTS AND OPPOSING AMICI DREW IMPROPER CONCLUSIONS FROM THE FACTS SURROUNDING THE ACQUISITION OF INFORMATION CONCERNING THE POSSIBILITY OF OBJECTIONABLE MATERIALS IN THE SCHOOL LIBRARIES.

Both directly and by innuendo Respondents and opposing *amici* have attempted to impute to Petitioners all manner of tainted motivation as a result of the source of the initial information precipitating the ban which was obtained by one board member at a conference sponsored by a conservatively oriented educational organization. An examination of the record will show this to have been a great disservice to the Island Trees Board of Education. It distorts the application of some of the important principles upon which a decision in this case will in part be based.

The organization, Parents of New York - United (PONY-U), has been referred to so often and so disparagingly in the opposing briefs that one would have expected to have it appear as a named party in the caption of this action. Not only have its motives been impugned and transferred to the mind set of all seven members of the Island Trees Board of Education, but not one opposing brief has used the word "education" in describing it.[3] As shall be seen

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[3]The P.E.N. American Center brief refers to an "issue oriented pressure group" (p. 32) using "hysterical fringe group politics" (p. 6); that of the American Jewish Congress, et al to a "self proclaimed conservative group" (p. 4); that of New York State United Teachers to a "conservative political conference" (p. 2); that of the National Education Association to a "politically militant parents group" (p. 3 F.N. 2); that of the Anti-Defamation League of B'nai B'rith to a "conservatively oriented parents group" (p. 4) and that of Respondents to a " 'conservative' parents group" (p. 1) "with a particular social and political ideology" (p. 19). The record, however, describes it as "a conservative organization...composed of parents concerned about *education* in this State." (638 F. 2d 404 at 407 - Judge Sifton quoting board member Ahrens); an "issue oriented *education* group," (638 F. 2d 404 at 436 - Judge Newman's description); an "*educational* conference sponsored by PONY-U" (J.A. 22 - affidavit of R. Ahrens) and "an organization interested in *educational* affairs in New York State" (J.A. 101 - affidavit of F. Martin). (Emphasis provided)

this is both misleading and totally unjustified.

This attempt to assess guilt (or transferred motivation) by association is evidenced by the statement in Respondents' brief (at p. 19) referring to the "inference that the political, moral and religious judgments made by the organizers of the PONY-U conference have supported this ban from beginning to end." That this is a totally erroneous inference is clear from the record.

The governing body for higher and lower education in the State of New York is the Board of Regents comprised of twelve Regents elected one each year by the state legislature. Such a Regent was Genevieve Klein whom the then board president, Mr. Ahrens, and Vice President, Mr. Martin, had heard speak at a Nassau-Suffolk [counties] School Boards Association dinner at a nearby high school. At that dinner she spoke personally with them and recommended that they attend a forthcoming PONY-U conference at which she would speak. They had never before attended a PONY-U function but decided to attend this one along with a third board member solely because of Mrs. Klein's recommendation and did so. (Ahrens dep. pp. 13, 21; Martin dep. pp. 4-8, 10; J.A. pp. 21, 22, 101, 102).

At the conference another school district (Randolph, New York) had prepared a five page compendium of excerpts from books to which the Randolph board members attending objected (J.A. pp. 30-42). These pages also contained editorial commentary apparently reflecting the views of the Randolph board members attending the conference. (J.A. 30-42). It is this commentary which Respondents and opposing *amici* have used in an attempt to tar the whole Island Trees Board of Education with a "political" brush. Mr. Martin obtained one of these compendia and subsequently made his own list merely setting forth the names and authors of the books which list he subsequently utilized in ascertaining that eleven of the approximately thirty books listed

were in fact in his district's libraries. (J.A. pp. 22, 24, 101, 102, 105). Subsequently copies of excerpts were made available to parents attending a meeting called to discuss the issue. The comments on the original list from the Randolph School District were deleted. (Ahrens dep. at 19).

To impute the allegedly "political" or "religious" nature of some of the Randolph board's editorializing to the Island Trees board is highly specious especially in view of the fact that two of the books on the original list were restored to the library. (J.A. pp. 75-79). To impute the alleged "political" nature of PONY-U to the board's actions is even more misleading. One can think of no better reason for a local school board member to attend an *educational* conference than on the recommendation of one of his state's twelve highest education officials.

Whatever the nature of PONY-U's motives, any attempt to impute any of its motive ideology to the long subsequent action of a seven member board of education under the circumstances shown by the record as above should be doomed to well deserved failure. It is sad that the Judge writing the plurality opinion in the court below was also unable to make the distinction between clear and unequivocal adoption of another's motives and principles and guilt by minimal association. It is hoped this flawed logic has finally been exposed.

A less integral but equally flawed attack has been made on Petitioners for allegedly permitting PONY-U (or Randolph School District) to be the catalyst for their concern rather than complaints by citizens, students or teachers. (brief of American Publishers Association, et al, p. 9). Apparently only the "professionals", trade journals and "citizens" have a right to bring to a board member's attention potentially objectionable material. Respondents exhibit a total lack of familiarity with the workings of boards of education. Members are (and should be) constantly

attending conferences and symposia given by educationally oriented lay and professional organizations and associations in an effort to expose themselves to the interests, concerns and accomplishments of others. Publishing houses and book sales organizations commonly have representatives and sales materials on hand at these meetings. This should not be a one way street. Nor should it be forgotten that the board members themselves are citizens and taxpayers and, in most cases, have children attending the system's schools.

POINT IV

PETITIONERS NEED NOT FOLLOW NARROWLY DRAWN AND SPECIFIC EDUCATIONAL CRITERIA IN DETERMINING WHETHER TO PROSCRIBE CURRICULAR MATERIALS; THE PROCEDURES FOLLOWED SATISFY THE CONSTITUTION.

Opposing *amici*, American Publishers Association, et al, American Jewish Congress, et al, and New York State United Teachers all contend that the Constitution compels adherence to precisely drawn educational criteria and narrow procedures before curricular materials may be withdrawn by a board. Respondents score the *ad hoc* procedure followed by the Island Trees board as unconstitutional.[4]

Were educational criteria in the narrow sense relating to specific disciplines and testable results necessary the essential concept requiring the transmission of community values by the socialization of the student body to the culture and mores of the immediate school district watershed would be meaningless. Elementary and secondary education deals with more than simply "education". It is an induction into the community and its social and moral attitudes. In order to meet this responsibility school boards must have much greater discretion than that accorded by precise educational criteria.

The suggestion that the constitution requires narrow substantive and procedural guidelines is equally improper and in addition would create a judicially unmanageable and impossible task. Rather than serve the essential purpose of keeping the

[4] *Amicus* NYSUT, the teachers union, goes even further and offers a "solution" to the Court—the requirement of a finding that a material "is both educationally unsound and irrelevant" by a joint committee containing no board members. (at p. 24, 25). Thus would disappear the last remaining vestige of local citizen control of public education. NYSUT has apparently forgotten that "the board is a political body chosen precisely to impose policies on the professional staff". (Tex. L.R., supra, at p. 524).

federal (and state) judiciary out of the day to day operation of the nation's schools such a requirement would provide the basis for a miasmal outbreak of litigation. Our schools have been burdened with a plethora of regulatory requirements to the point of fiscal stress and loss of public support. To add one more in an area of such sensitivity and where precedent does not compel it would wreak havoc.

Amici may have mistaken the student Respondents' rights in the case at bar with the purer expressive rights of students conducting campus publications or with the academic freedom rights surrounding teacher methodology. Even a student in a classroom, the gym or the halls of a school building may be constitutionally disciplined by members of the staff even to the point of brief suspensions as a result of the use of obscenities or vulgarisms without having previously been given a list of proscribed words or actions. The students may not use the language objected to on the school grounds and there is no reason why the board should give the appearance of having endorsed the vulgarity in the proscribed volumes. There is less reason to compel restoration (and endorsement) of the books in question due to lack of a due process type hearing on removal.

Requiring a board to draft and follow narrow precise guidelines regulating the presence of obscenities in library books is an impossible task. Does an eight letter obscenity carry the weight of two four letter ones? Can one board consider language obscene that may be somewhat common in another district? To what extent can obscenity related to the storyline be retained? Is the fact that the material in question could have been written without obscenity relevant? Are scatological obscenities as objectionable as copulative ones? What differentiation is to be made regarding a student's maturity?, etc., etc.

But the task is impossibly complicated when one realizes that

obscenity and vulgarity is just the beginning. If a board has a responsibility to transmit community moral, social and political values this must be accomplished by far more complex efforts than just minimizing vulgarity and obscenity around the schoolhouse and among the curricular materials. Materials must be selected that reflect in many other aspects the cultural, ethical and social mores of the community. If it is discovered that some do not do so it would be ridiculous as well as unlawful to permit the removal of such material only upon compliance with narrowly specific criteria.

The requirement of such criteria in a situation such as is before the Court in the absence of the disciplining of students or staff, where purely expressive conduct is not involved and where such abstract concepts as moral and social values are involved is not constitutionally compelled nor should it be.

POINT V

THE RECORD BELOW IS AMPLY SUFFICIENT TO ENABLE THE RENDERING OF A DECISION UPON THE QUESTIONS PRESENTED WITHOUT THE NEED FOR A PLENARY TRIAL.

As a result of the unusual, but by no means unique, grant of *certiorari* by the Court without a full trial having been held below, and of the call for such a trial in the briefs of opposing *amici*, The National Education Association and the AFL-CIO, et al, such a request should be addressed.

Although the court below in its final decision remanded the cause for trial, apparently in order to ascertain whether Petitioners were politically motivated, two of the three panel judges (Sifton and Mansfield) had sufficient facts before them to enable each to grant summary judgment. It was only Judge Newman who opted for a trial with Judge Sifton joining him so as to assure a plurality.[5] In addition both counsel assured the trial court judge that there were sufficient facts before him to enable him to render a decision and Judge Pratt agreed to and did so.

Petitioners made every effort to annex to the moving papers all materials of any probative value. Respondents had the right of discovery and they deposed the President and Vice President of the board. There was ample time to depose additional members or to counter the affidavits supporting Petitioners' motion. They chose not to no doubt since there truly were sufficient facts before the trial court to enable it to decide the motion and cross motion for summary judgment. In addition both parties submitted lengthy statements pursuant to local Rule 9-g in which all

[5]It is interesting to note that the same panel granted a school district's motion to dismiss a complaint in a companion case where the sole difference was the absence of an allegation regarding the use of the board's "political" values. *Bicknell v. Vergennes Union High School Board of Directors*, 638 F. 2d. 438.

pertinent facts were set forth with little dispute as to them (See J.A. pp. 19, 20, 128-131, 138-145).

If all that is necessary to compel the federal judiciary to grant full blown review is a bare allegation by school students that a board utilized its political as well as social and moral values in arriving at curricular determinations, the courts of our nation will be inundated. Judge Sifton, dissenting in *Bicknell, supra,* did so to give plaintiffs an opportunity "to explore whether the reasons [for proscribing curricular materials] ...were...because of improper ideas they expressed..." (at p. 443). Fishing trips or explorations of this nature should be severely discouraged. If it is thought that there has been an impermissible suppression of ideas let the charge be leveled in the complaint, the 9-g statement or in the cross motion.

Some thought must also be given to the effects of a trial upon the dedicated and community spirited citizens who serve on boards of education. There is no question but that under the lower court's guidelines the trial of this case will be a circus. Petitioners' innermost values will be challenged amid the glare of media exposure. The vulgarity to which they objected will be repeated again and again. No doubt they will be forcefully reminded time and again of the critical acclaim received by the volumes which they in their "ignorance" proscribed. They will be pitted against their own staff and other experts as to their knowledge of English literature, ghetto life, grammar and the society in general of which they are part.[6]

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[6]Proof that the above scenario is not a figment of the writer's imagination is contained in a column from the New York Times of Sunday, September 27, 1981 by Joseph H. Cooper, editorial counsel to the New Yorker, commenting on the case at bar, entitled *If You Ban a Book*. Among others it asked the following questions of "would-be-book-banners:"

> 4. Would you feel comfortable having to elaborate on why you find the material objectionable? Having to explain your motives? What are you prepared to do, go through, and spend to explain and defend your actions?
> 5. Do you like publicity? Notoriety?
> 6. Do you like lawyers? Courtrooms?

There must be and is another way. On balance the constitutional rights asserted by the students are so overweighed by the competing rights and responsibilities of local boards of education that such a scenario cannot be permitted to take place except upon a clear allegation that there has been an impermissible suppression of ideas setting forth the nature of that suppression.

CONCLUSION

The order of the District Court granting summary judgment to Petitioners should be permitted to stand and the order of the Circuit Court of Appeals remanding this cause for trial should be reversed.

Dated: Babylon, New York
February 20, 1982

Respectfully submitted,
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